

RECOGNISING SENTIENCE IN THE PORTUGUESE CIVIL CODE

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SUMMARY

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I. Introduction

On the 1st of May 2017, the amendment to the Portuguese Civil Code approved by Law n. 8/2017, of 3rd March 2017¹, entered into force. The amendment establishes the legal status of animals, in accordance with which non-human animals are no longer considered “things” but, instead, sentient beings.

This amendment is in line with the growing body of knowledge on animals, their sentience and conscience², and with the progress made also in other countries in this respect³.

The purpose of this report is to briefly analyse the Portuguese amendment and question the depth of its impact on the lives and well-being of non-human animals, especially the ones subject to institutionalised uses and exploitation, such as farm and laboratory animals.

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¹ Law n. 8/2017, of 3rd March, which establishes the legal status of animals and amends the Civil Code, approved by Decree-aw n. 47 344, of 25th November of 1966, the Civil Procedure Code, approved by Law n. 41/2013, of 26th June, and the Criminal Code, approved by Decree-Law n. 400/82, of 23rd September. <http://www.derechoanimal.info/bbdd/Documentos/2273.pdf> [Portuguese Animal Legal Status].

² See *The Cambridge Declaration on Consciousness*, July 7, 2012.

³ Germany (article 90-A of the Civil Code and article 20-A of the Constitution), France (article 515-14 of the Civil Code), Switzerland (article 641-A of the Civil Code and article 80 of the Constitution), Austria (article 285-A of the Civil Code).

II. The Portuguese amendment to the Civil Code

In 2016, practically every Portuguese political party represented at the National Parliament submitted proposals for amending the legal status of animals in the Civil Code⁴. The submission of proposals for this purpose was not new however: in fact, in 2012, PS (Socialist Party) (currently the political party heading the Government but then in the opposition) had already submitted a proposal for amending the legal qualification of animals⁵.

The 2016 Draft Bills were discussed at the Parliamentary Commission for Constitutional Affairs, Rights, Freedoms and Guarantees, where, on the 21st December 2016, all political parties reached an agreement on the wording of the final proposal to be submitted at the Parliament the following day.

The final proposal⁶, which replaced the 2016 Draft Bills, was unanimously approved at the Parliament on the 22nd December 2016 and then published on 3rd March 2017 – Law n. 8/2017 of 3rd March (henceforth “Portuguese Animal Legal Status”)⁷.

The Portuguese Animal Legal Status brings forward a number of positive changes to the manner the law perceives non-human animals.

- Firstly, it creates a new division on the Civil Code’s organization under which some of the provisions relating to animals are integrated⁸. This change to the structure of the Civil Code is extremely relevant because it represents an additional effort in the distinction between animals and things. It is even the more relevant given that not all Draft Bills made this structural change as many of them simply proposed amending the name of the Subtitle relating to things to “animals and things”⁹. Finally, the creation of a new division on the Civil Code exclusively dedicated to non-human animals may simplify future work on the protection of animals in the Code

⁴ Draft Bills 164/XIII/1.^a (PS – Socialist Party), 171/XIII/1.^a (PAN – People-Animals-Nature), 224/XIII/1.^a (PSD – Social-Democratic Party) and 227/XIII/1.^a (BE – Left Bloc) [*Draft Bills*].

⁵ Draft Bill 173/XII.

⁶ Replacement Text of Draft Bills 164/XIII (PS) which amends the Civil Code and establishes a new legal status for animals, 171/XIII (PAN) which amends the Civil Code and recognises animals as sentient beings, 224/XIII (PSD) which amends the legal status of animals in the Civil Code, and 227/XIII (BE) which amends the Civil Code and confers a legal status to animals.

⁷ *Supra* note 1.

⁸ New Subtitle I-A to Title II of Book I of the Civil Code, titled “Of the Animals”, and which contains new articles 201-B to 201-D.

⁹ Draft Bills 164/XIII of PS and 224/XIII of PSD, *supra* note 4.

as it will allow new legal provisions to be simply added to the new Subtitle of the law.

- Secondly, animals are expressly recognized as living beings endowed with sensibility. In addition, animals are legally protected by virtue of their nature in accordance with the provisions of the Civil Code and special laws on animals¹⁰. This wording is the central point of the amendment: it represents a symbolic departure from Cartesian principles under which animals were objects devoid of feelings and sensations.

The amendment also brings other changes worth mentioning:

- The ownership of animals is expressly subject to a number of limitations:¹¹ the owner shall guarantee the well-being of the animal and respect the characteristics of each species. He shall further, while exercising his rights, comply with the provisions on the creation, breeding, keeping and protection of animals, as well as relating to endangered species, whenever required. The amendment further adds that the duty to guarantee the well-being of the animal includes, among others, (i) access to water and food in accordance with the needs of the species, (ii) access to veterinary care whenever justified, including prophylactic measures, identification and vaccination as provided in law. In addition, it is clarified that the ownership of the animal does not allow, without legitimate reason, the infliction of pain, suffering or other mistreatment that will result in unjustified suffering, abandonment or death.

This amendment has significant value because it represents the recognition that animals shall be protected directly by the law and not indirectly as property of their owner – in fact, animals are also protected against their owner. This amendment brings limitations to the use of property that are justified by the property itself (the animals) and not by any third party's interests, specifically the interests of the owner.

- In case of injury to the animal, the indemnification obligation covers the expenses incurred for his treatment, even if such expenses are higher than the value of the animal. In addition, in case of injury to a companion animal that causes his death, removal of an important organ or member, or serious and permanent impact to his locomotion capability, the owner has the right to indemnification for the grief or moral suffering¹².

This amendment brings forward a further departure from the concept of animals as mere things, recognizing the emotional attachment between human and animal and the right to indemnification regardless of the (property) value of the animal. It is also important to note that the right to indemnification for expenses applies to all

¹⁰ Articles 201-B and 201-C of the Portuguese Animal Legal Status, *supra* note 1.

¹¹ *Ibid.*, article 1305-A.

¹² *Ibid.*, article 493-A.

animals and in benefit of whoever has incurred in such expenses (even if not the owner).

- Finally, in case of divorce, the criteria for determining which spouse keeps the animal is no longer ownership: in fact, the companion animal is left with one or both spouses in light of their interests and of the interests of their children, and also of the well-being of the animal¹³. In addition, companion animals that each spouse has at the time of marriage are excluded from the regime of general communion¹⁴ and, in case of divorce by mutual consent, the divorce agreement shall include agreement on the destiny of companion animals¹⁵.

These family-related provisions on companion animals reflect, too, the emotional attachment between humans and animals and further take into due attention the well-being of the animal in case of divorce.

It is also important to note that, because non-human animals are still considered to be property¹⁶, the provisions on property applicable to things remain applicable to animals – to the extent such provisions are not incompatible with their (animal) nature¹⁷. However, it is important to note one very relevant amendment relating to the rules applicable to the finding of animals and things¹⁸: previously, whoever found a movable thing or animal had to return them to their owner. Now, in addition to other changes in law¹⁹, the Civil Code expressly permits the finder to keep the animal in case he reasonably believes that the animal is victim of abuse by his owner²⁰. This addition to the Code is of extreme importance because it protects the animal himself with one very relevant aspect: all animals are protected through this provision, and not only companion animals. This is all the more important because the Portuguese Criminal Code only covers mistreatment against companion animals²¹, which means that other

¹³ Ibid., article 1793-A.

¹⁴ New subparagraph h) of point 1 of article 1733. The regime of general communion stipulates that the assets belonging to each spouse at the moment and after marriage belong to both spouses equally.

¹⁵ New subparagraph f) of point 1 of article 1775.

¹⁶ The amendment to article 1302 of the Civil Code added a new number 2 which expressly indicates that animals can be subject to property rights.

¹⁷ Article 201-D of the Portuguese Animal Legal Status, *supra* note 1.

¹⁸ Ibid., article 1323.

¹⁹ For example, whoever finds an animal shall, for purposes of finding his owner, resort to the identification means accessible through a veterinary, when possible (article 1323, n. 3).

²⁰ Ibid., article 1323, n. 7.

²¹ Articles 387 to 389 of the Portuguese Criminal Code (Decree-Law n. 48/95, of 15th March, as amended by Law n. 69/2014, of 29th August).

domestic animals are excluded. However, through this amendment to the Civil Code, all animals have at least an additional means of protection against mistreatment.²²

Despite the positive impacts of the amendment to the Civil Code highlighted above, there are a few shortcomings that need to be mentioned.

- The first one is clearly the fact that non-human animals remain subject to the same treatment as property. There are a few notes worth making in this respect:
 - Firstly, the amendment did not recognize animals as subjects of rights or as persons. Despite the fact that at least one Draft Bill aimed to indicate that animals were sentient beings holders of legally protected interests²³, the final amendment did not contain this provision. Hence, the amendment clearly opted for the recognition of animals as a “tertium genus”: sentient beings to whom humans owe duties. It may naturally be discussed whether the limitations to the property rights of owners represent true rights owned by the animals themselves²⁴. However, the fact remains that this was not expressly recognized in law.
 - In this respect, it is also relevant to make the note that recognizing rights for animals does not seem incompatible with a specific status different from “persons”²⁵ and not even with the fact that they cannot have duties towards humans. With relation to the first point, despite the fact that traditionally there has been a link between person and ownership of rights, this link is not necessary and can be changed in law – the law is a human construction and does not seem to prevent the recognition of rights by beings that are not qualified as persons²⁶. With relation to the second point, despite the fact that the contractualist theory under which rights can only be owned by those that are capable of holding obligations remains endorsed by many, once again nothing prevents the law from changing in this respect²⁷. In addition, one needs to be reminded that such requirements have not been applied to severely challenged humans nor to newborns, both of whom hold rights without the corresponding duties.

²² Note that the Portuguese Animal Legal Status also amended the Portuguese Civil Procedure Code in article 736 (by means of indicating that companion animals are not subject to seizure) and the Portuguese Criminal Code in a set of articles so as to guarantee the conceptual distinction between animals and movable things.

²³ Draft Bill 171/XIII, from PAN, *supra* note 4.

²⁴ In this respect, David Favre, *Living property: A New Status for Animals Within the Legal System* [Favre].

²⁵ See, e.g., Heron José de Santana Gordilho, Tagore Trajano de Almeida Silva, *Animais em Juízo: Direito, Personalidade Jurídica e Capacidade Processual*, in *Revista de Direito Ambiental*, 2012.

²⁶ Favre, *supra* note 24. Disagreeing, Gary Francione, *Animals, Property and the Law*, 2007 [Francione].

²⁷ See also, in this respect, the Opinion of the Portuguese Lawyer’s Bar Association on the Draft Bills 164/XIII/1.^a (PS), 171/XIII/1.^a (PAN), 173/XIII/1.^a (PAN) and 209/XIII/1.^a (PS), dated 18 May 2016.

— Finally, even if animals had been recognized as holders of rights or interests, two questions had to be put forward: first, which rights should be recognized? Secondly, would such rights have any strength in light of the fact that animals remain subject to property?

The first question may lead to answers such as the right to life, physical integrity and bodily autonomy²⁸. It may also lead to answers such as the right to nutrition, health and housing. The second answer seems more aligned with the purposes of the amendment to the Civil Code²⁹, leading to the recognition of the need to protect non-human animals while keeping them subject to human dominion. The first answer might, in theory, subtract animals from the property or control of humans (at least to the extent such property or control would impact on such rights). But the fact remains that, due to current social and economic constraints of a society largely reliant on the use of animals, even the recognition of such rights would most likely be accompanied by severe exceptions and limitations, thus making such rights largely irrelevant.

The above already answers the second question above: the strength of such rights would be little.

- Such little strength seems confirmed by the limitations to the property right indicated in the Portuguese Animal Legal Status: the duties of the owner are always subject to general abstract wordings such as “whenever required”, “without legitimate reason” and “unjustified suffering”³⁰. In a society that largely relies on the exploitation of non-human animals, it is doubtful that these limitations to the property right bring more than a condemnation of gratuitous and random acts of cruelty³¹. Indeed, the legal provisions applicable to farm animals and laboratory animals still allow acts that would otherwise be considered cruelty³². In addition,

²⁸ Tom Regan, *Animal Rights, Human Wrongs*, 2003. Steven Wise, *Rattling the Cage, Towards Legal Rights for Animals*, 2000. See also Richard P. Haynes, *Animal Welfare, Competing Conceptions and their Ethical Implications*, 2008.

²⁹ See the limitations on property in article 1305-A of the Portuguese Animal Legal Status, *supra* note 1.

³⁰ *Ibid.*

³¹ Francione, *supra* note 26, at 32.

³² Despite the seemingly demanding protection granted, e.g., to farm animals and laboratory animals. Decree-Law 64/2000 which transposed Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes; Decree-Law 72-F/2003, which transposed Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens; Decree-Law 48/2001 which transposed Council Directive 2008/119/EC of 18 December 2008, laying down minimum standards for the protection of calves; Decree-Law 135/2003, which transposed Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs; Decree-Law 79/2010, which transposed Council Directive 2007/43/EC of 28 June 2007 laying down

because the Criminal Code did not extend the criminalization of abuse against animals to all animals (and thus remains limited to companion animals³³), it remains to be seen how these limitations to the property right protect animals that are not companion animals.

It can be argued that the right to indemnification for the expenses incurred in helping an injured animal, as well as the right not to return an animal that has been mistreated, protect the animals even if they are not companion animals. However, with respect to the first point, it is not clear whether such right would still apply if the rescuers entered the owner's premises without consent in order to assist the animal. But, more importantly, given the legal general consent for (mis)treating certain animals that are not companion animals (especially farm and laboratory animals), it is not clear whether such animals would be considered to be injured for purposes of the indemnification. Clearly, they would not be considered mistreated for purposes of their return to their owners.

- Furthermore, the recognition of indemnification for expenses in case of injury to animals, and of the grief and moral suffering of the owner of companion animals, is still short of ideal: no indemnification exists for the pain and suffering of the animal himself.

Hence, the amendment to the Civil Code, despite being a very important progress for the protection of non-human animals, still has severe limitations that prevent the effective protection of animals.

The question that needs to be asked, then, is whether another approach would have been possible.

III. The feasibility of alternative approaches

The determination of whether other approaches to the legal status of non-human animals would be feasible requires an analysis on two levels: first, at the Portuguese level; secondly, at the European level.

minimum rules for the protection of chickens kept for meat production; Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97. Decree-Law 113/2013 which transposed Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes.

³³ PAN Draft Bill 173/XIII/1^a, which aimed at extending protection to all animals at the criminal level, was rejected on the same day that the amendment to the Civil Code was approved.

At the Portuguese level, it is doubtful that another approach would have been successful: indeed, the history of the attempts to change the legal status of animals, together with the refusal to extend criminal protection to all sentient animals, shows that there is still strong opposition to better protecting animals in Portugal³⁴. In addition, the approach taken in other European countries in this respect has been the same now adopted in Portugal. It is fully clear that Portuguese politicians would not go further than other countries have done with relation to the legal status of animals. As way of example, the recognition of animals as sentient beings at the Constitutional level could have been an approach worth taking, but that option was not even raised. In addition, the recognition of an indemnification right for the injury suffered by the animal himself would have been an important step.

With relation to the qualification of animals, it is doubtful that even if Portugal would have gone further than a status of “tertium genus”, that it would have had any substantial relevant impacts.

The options here would be either recognizing non-human animals as persons or recognizing them as subjects of rights even if not persons. However, and as it has already been mentioned above, it is doubtful that this approach would effectively better protect non-human animals: in fact, because the protection of animals is done by means of special laws regulating companion animals, farm animals, laboratory animals, and bullfighting, among others, the provisions of these laws that allow use and slaughter of animals would still apply: hence, any protection granted through rights would be limited by the special laws.

This is clear from looking at other countries that have approved similar amendments but retain specific laws very similar to the Portuguese ones (not least as a result of EU Directives): the amendment to the status of animals has had little impact on protecting the most vulnerable animals, especially farm and laboratory animals³⁵.

³⁴ See, e.g., in this respect, the opinion of Member of Parliament by PAN, André Silva, in http://www.sabado.pt/opiniao/convidados/andre_silva/detalhe/entre_as_pessoas_e_as_coisas_temos_agora_os_animais.html.

See also <https://www.publico.pt/2016/12/21/sociedade/noticia/animais-deixam-de-ser-coisas-mas-lei-dos-maus-tratos-vai-continuar-com-buracos-1755686>, where it is mentioned that the amendments to the Criminal Code were seen by political party PSD as “absolutely radical”, despite the fact that most of the proposals made are already law in other countries: e.g., Spain criminalizes mistreatment against all animals (Organic Law n. 10/1995, of 23rd November, as amended, article 337) and Italy criminalizes the homicide of an animal (*Regio Decreto 19 October 1930, n. 1398, article 544-bis*).

³⁵ E.g., several exposes in such countries have revealed appalling treatment of animals. For an example, see the expose done by Cruelty Free International at Max Planck Institute, Germany. <https://www.crueltyfreeinternational.org/what-we-do/investigations/monkey-experiments-max-planck-institute-germany>.

Indeed, many of these laws are of EU origin, transposing EU Directives³⁶. An European approach aimed at effectively protecting non-human animals by means of abolishing practices that are inherently cruel to animals would be an essential step in guaranteeing that a rights-based approach would be effective. Therefore, it is this author's opinion that more work needs to be done with relation to the specific laws that apply to animals before a cross-wide approach that grants rights to animals is successful.

A last question remains however: whether granting rights without abolishing the property status of animals is possible or advisable. This author does not see strong legal barriers to granting rights to animals whilst at the same time permitting humans to continue to retain property rights over animals – once again, law is a human construction and it can be built and rebuilt however society deems fit. Whether it is advisable is another issue: there may be the risk that this approach may delay an effective full restructuring of the legal approach to animals, prolonging human ownership over animals – a situation that this author considers ill-advised in light of the sentience of animals: indeed, a non-speciesist and non-anthropocentric view necessarily requires that animals are not subject to property. What is more, it may be legitimately questioned whether animals as property can be effectively protected against human cruelty and abuse in light of the centuries' old concept of property as granting owners a fully-fledged right to use property as they deem fit³⁷.

More correctly, if property is to be limited to protect animals' rights (and by rights here I mean rights to life, physical integrity and bodily autonomy – hence, rights that clearly go further than mere welfare measures for nutrition or housing), then it is no longer “property” that we are talking about.

In this case, either animals are left alone (an option that may be difficult to execute given the numbers of domestic animals that may find it difficult to live in the wild) or humans retain their relationship with animals. In this last case, it should not, however, be a property relationship: humans should, in such a case, act in the benefit of the animals in a model more similar to that of the relationship between parents and children: hence, a model of guardianship³⁸.

It is clear, however, that we are far from this model: the use and exploitation of animals permeates society in such a deep manner that any changes to the legal approach to animals will necessarily have to be supported by civil society. This is not impossible: step by step it is possible to abolish the most abhorrent forms of animal exploitation and then

³⁶ *Supra* note 32.

³⁷ Francione, *supra* note 26.

³⁸ Similarly, George Seymour, *Animals and the Law: Towards a Guardianship Model*, 2004. See also David Favre, *Equitable Self-Ownership for Animals* (through keeping the property model).

promote a view based on guardianship instead of property. That day will be the day where the rights of animals will be real and effective.

IV. Conclusion

Changing the legal status of non-human animals from things to sentient beings is a worthwhile historic change because it represents the departure from Cartesian philosophy that has long dominated Western culture and laws. When such change is accompanied by additional measures that grant more protection to animals then it can be said that animals are better off.

However, because the use of animals is regulated by special laws that in most cases allow acts to be performed on animals that clearly cause them extreme pain and suffering, the extent to which the change to the legal status of animals protects them is very limited. This is all the more clear in Portugal, because on the same day that the amendment to the Civil Code was approved, amendments to the Criminal Code that would protect all animals (and not only companion animals) were rejected.

It is clear that a single country cannot walk alone along the path that will place humanity further away from the exploitation of animals. But that does not excuse a country from not approving laws that will place us closer to that target where such laws are clearly requested by society – such as the case of the changes to the Portuguese Criminal Law. Animals are not things, but, for practically all purposes, they remain to be treated as such. Departure from Cartesian principles was made only at the declarative/symbolic level, not at the practical level.

Hence, the change to the legal status of animals is just one of many stepping-stones in the path toward the protection of animals.

We have only just begun.